REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CORAM: E. K. O. OGOLA, J.

CRIMINAL APPEAL NO. 99 OF 2018

FM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence by T. K. Kwambai, RM, in Butali PMC Criminal Case No. 33 of 2017 dated 11/7/2018)

JUDGMENT

1. The appellant FM was convicted for the offence of defilement contrary to Section 8 (1) and (3) of the Sexual Offences Act. The particulars are that on the 23.09.2017 at [particulars withheld] area Mugai Location in Kakamega North Sub-County in Kakamega County intentionally and unlawfully caused his penis to penetrate the vagina of SM a child aged 12 years old. The appellant also faced alternative count of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act, the particulars being that in the same place and time as in Count one above intentionally and unlawfully touched the vagina of SM a child aged 12 years.

2. The appellant was tried, found guilty and convicted on the main Count and sentenced to serve 20 years imprisonment.

3. Not being satisfied with the conviction and sentence the appellant has preferred this appeal based on the following grounds:-

> ***1. That the learned trial magistrate erred in law and facts by convicting me on a charge and its particulars that were not supported by evidence.***
>
> ***2. That the learned trial magistrate erred in law and facts by declaring the main charge proved on evidence that was weak to prove the ingredient of penetration.***
>
> ***3. That the learned trial magistrate grossly erred in law and facts by proving me guilty of the offence while disregarding that I was not subjected to corresponding medical examination under provisions of Section 36 (1) of the Sexual Offences Act No. 3 of 2006.***
>
> ***4. That the learned trial magistrate erred in law and facts by counting me only on reliant of Section 124 of the evidence act while disregarding the importance of corroboration.***
>
> ***5. That the learned trial magistrate grossly erred in law and facts by rejecting my plausible defence of alibi.***

4. The appeal is opposed by the prosecution. The appellant filed written submissions on 26.8.18 while Mr. Ongige for the prosecution made oral submissions in court.

5. This being the first appeal this court will re-evaluate the evidence adduced in the trial court and arrive at its own conclusion based on that evidence.

6. To prove its case the prosecution called four (4) witnesses.

7. **PW1 was the complainant**. Being a child of tender years the trial court conducted a *voire dire* examination and was satisfied that the complainant understood the meaning of oath and she gave sworn testimony. PW1 testified that she lived with her mother and her grandparents. She was then in class six (6) at [particulars withheld] Primary school and was eleven (11) years old. She testified that the appellant is their general worker and had worked for them for about one year. The appellant used to work for them during the day. On 23/9/2017 at about 11.00 a.m. the complainant was at their home with her brother one J doing house chores. The appellant told the

complainant to assist him in planting vegetables at her grandmother's farm. She went with her brother and after they finished planting the appellant told her brother to go and tame the pigs. The complainant remained with the appellant. He pulled her to the bathroom which was just near. He placed her inside the bathroom, removed all her clothes by force and then placed her on the floor. He removed her panty and started having sex with her. The complainant then screamed and the appellant left and ran away. She was later taken to Malava District Hospital where she was treated. On cross examination the complainant testified that the appellant had no grudges with anybody at her home. She said that the appellant had told her not to tell anybody that the appellant defiled her. That one M used to look after their cow but he stopped going to their home when their cow died.

8. **PW2 BM**, was a business lady at [particulars withheld] market. She testified that the appellant used to work for them as a casual labourer or shamba boy. He had worked for them for 2 weeks. His work was general work. He was doing his work well and used to be paid on daily basis. PW2 did not have any grudge with the appellant. She stated that on 23/9/2017 at about 7.00 p.m. when she went to her house she found PW1 had not done the work she had assigned her and after asking why she had not done so, she told her that the appellant had gone to the house and asked for water and asked her to assist him to plant the vegetables. Earlier in the day PW2 had left the complainant with her son aged two years one J. PW1 told PW2 that the appellant had defiled her. She examined her and found she had bled and was in pain. The complainant told her that she did not report to any other person. On cross examination PW2 said that she went to Malava Police station on the same day and reported the incident after the appellant had been arrested and later took the complainant to Malava District Hospital where she was examined.

9. **PW3 Kizito Sifuna** was a Clinical Officer at Malava County Hospital. He testified that on 24/9/2017 the complainant then aged 12 was taken to their facility by her mother on allegation of having been defiled by a known person to her on 23/9/2017. He stated that on physical examination the hymen allowed one finger (index). High vaginal swab showed presence of many spermatozoa. Urine test for pregnancy was negative. HIV was negative, Syphilis was also negative. He testified that the patient had taken 21 hours to their facility. He further stated that the complainant was given PEP and drugs to prevent pregnancy. He concluded that the degree of injury was defilement. PW3 filled and signed the P3 form on 25/9/2017. He also produced her treatment booklet with the same history and findings. On cross-examination he stated that the complainant said that she knew the person who defiled her.

10. **PW4 was No. 56659 Sgt. Consolata Lugonzo** of Kabras Police Station. She testified that on 24/9/2017 at 10.00 a.m. she was in the office when the complainant and PW2 alleged that on 23/9/2017 at 11.00 a.m. she had left the complainant at home with the grandmother and the younger brother. That the appellant then defiled the complainant and told her not to report but the complainant reported to her mother in the evening. She testified that they then reported the incident and she issued them with the P3 form and did investigations and charged the appellant after taking the complainant to hospital. That the appellant was brought to their station by the relatives of PW2. She stated that the complainant was born on 13/6/2006 and she produced her birth certificate as exhibit. On cross examination she testified that the complainant identified the appellant as the person who defiled her. That she was accompanied by her mother and a police officer to the hospital.

11. The trial court found that the appellant had a case to answer. He was put on is defence, and he gave a sworn statement. He testified that he is a casual worker and that on 23/9/2017 he went for her casual work at the house of PW2 and stayed in the said homestead alone without the children. That he worked from morning until 1.00 p.m. when he went to fetch water for bathing and went to the shop which belongs to PW2. He stated that at the shop he was paid his dues by PW2 and he went to run his other errands and even went to the hotel where he took his lunch. He testified that in the evening he went to his rental house and at 8.00 p.m. and after he had taken his supper he heard a knock at the door and it was his landlord who then asked him where he worked on that day, and he answered that he worked at PW2. The landlord told him that he was required at PW2 for further assignments. He left with the landlord and while at PW2's place the landlord and PW2's husband left him inside the house and they went outside and talked where the appellant heard PW2's husband saying that he would use money to ensure that he (the appellant) is jailed. That they then took a rope, tied and took him to the police station where on the following day he was told that he had defiled PW1, an allegation which he denies. On cross examination the appellant confirmed that PW2 used to call him to her place to do casual work and that it was not the first time to work for her. He stated that PW2's children were not there on that day as they had gone to school. That they usually go to school even on weekends and that PW2 had an herds boy one M. That M was at the said homestead from 8 a.m. to 1.00 p.m. when the appellant left. The appellant testified that he is HIV positive for the last six years.

12. The trial court found out that the prosecution had proved its case on a balance of probability and that the defence was a mere defence, and convicted and sentenced the appellant accordingly.

13. I have carefully considered the evidence tendered in the trial court. I have also considered the submissions of the parties herein. The issues for determination for this court will be as framed in the grounds of appeal.

14. The appellant submitted that the charge was defective and that in the charge the complainant was said to be aged 12 years while in evidence, the complainant, having been born on 13.4.2006 was aged 11 years 5 months. The appellant submitted that this variation made the charge defective. The prosecution replied that there was no contradiction in the age of the child between the charge and the evidence and urged the court to dismiss this allegation.

15. In my view the true age of the minor can only be determined at trial, so that the content of the charge on age can only be an estimate. The fact that the charge stated the age of the minor at 12 years was not inconsistent with the age of the minor established during trial at 11 years 5 months. However, the issue of age becomes relevant for the purposes of sentencing because different sentences are provided for various age groups. In this case for purposes of sentencing 11 years 5 months was in the same bracket of Section 8 (3) for minors aged between 12 and 15 years where punishment for defilement is not less than 20 years. The alternative would put the minor at 11 years and hence would fall under Section 8 (2) whose punishment is life imprisonment. The law does not deal in factional ages, so that a child of 11 years 5 months is a child between twelve and fifteen years for purposes of Section 8 (3) of the Sexual Offences Act. So the submissions by the appellant that the charge was defective is not correct. The offence for which he was charged was clear and clearly expressed in the charge sheet.

16. The appellant also submitted that he was convicted on inconsistent and unproved evidence, stating that there was no penetration, and that the same was not proved. In any event there was only the evidence of PW1 which was not corroborated. In respect to this issue the honourable trial magistrate, rightfully in my view, rendered himself as follows:-

"Having analyzed the above issue as such I then turn to the issue of penetration. Penetration under Section 2 of Sexual Offences Act has been defined as '*the partial or complete insertion of the genital organ of a person into the genital organs of another person****'. With regard to the issue of penetration it is the evidence of PW1 and 3 that will come in handy. According to PW1 she said that on 23/9/2017 the Accused defiled her when he unzipped and had sex with her. PW3 who is a Clinical Officer at Malava County Hospital examined PW1 on the following day and found out that PW1's hymen permitted one finger. It was his evidence that on conducting high vaginal swap the complainant's vagina showed numerous spermatozoa cells and that it had epithelial cells. The presence of epithelial cells clearly shows that there was some form of friction on the complainant's vagina. Further the only way that it can explain the presence of the spermatozoa is definitely through having sex. This two factors clearly demonstrate the issue of penetration. This will now lead me to analyze the issue of who then caused the said penetration and whether the test in Section 124 of the Evidence Act has been met.***

Section 124 of the Evidence Act states in its provisions that '*provided that where in criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the Accused person if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth'****.*

The above provision is the exception to the general rule that the evidence tendered must be corroborated. However, in applying the said provisions the court should be keen and the only test is that whether the evidence of the victim is credible bearing in mind that Sexual espicades are usually done clandestinely.

In this case PW1 is a minor who is slightly over 11 years old and she said that it was the accused who defiled her. She gave a clear narration of how the said incident occurred. She said that the accused who used to work for them requested her to assist him in planting vegetables and that he later told the complainant's brother to go and tame the pigs this is now the time the accused took the complainant to a nearby bathroom and defiled her. The accused in his defence did not deny being at the homestead of PW2 who is the mother to PW1. It is only his evidence that PW2 children were not there hence he did not defile the accused.

PW3 said that PW1's vagina had presence of spermatozoa hence the issue of who then defiled the complainant for the sperms to be present in her vagina.

Both PW1 and 2 clearly confirmed that they had known the accused prior to the said incident, there is no history of any grudges between the accused and PW2 so as to impute any victimization as alleged by the accused both during the prosecution case and the defence alluded by him."

17. This court is satisfied that the honourable trial magistrate applied the law on penetration correctly and convicted the appellant on that issue.

18. The appellant also alleges that the proceedings were held in a language which he did not understand. This allegation is denied by the prosecution. Also I have looked at the record. The proceedings were conducted in the Kiswahili language which the accused on 26.9.17 stated he understood. So the allegation on language barrier is not proved, and is in fact, an outright lie.

19. I have also looked at the appellant's defence. The trial court duly considered the defence and dismissed it, rightfully, in my view.

20. On sentencing, the appellant was condemned to serve twenty (20) years in prison. That was a mandatory sentence. That meant that the court could not consider submissions of the appellant on mitigation, even when, like in this particular case, mitigation was offered.

21. In that regard the court is prepared to consider the mitigation of the appellant. He had stated that he is a hustler and used to do casual work to fend for his family and that he has a wife who depends on him.

22. Having considered the said mitigation this court now sets aside the sentence of 20 years imprisonment given at the trial court and substitutes it with a term of thirteen (13) years in prison from the date of conviction.

Right of appeal within 14 days.

Delivered, dated and signed in open court at Kakamega this 13th day of September, 2019.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Ongige – State Counsel

Appellant -

Court Assistant – Mr. Erick